

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Implementation of the Satellite Home)
Viewer Improvement Act of 1999)
)
Retransmission Consent Issues)
)

CS Docket No. 99-363

REPLY COMMENTS OF LIN TELEVISION CORPORATION

LIN Television Corporation ("LIN") hereby replies to the comments filed in CS Docket No. 99-363 regarding the implementation of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA")¹ with respect to the requirement that broadcasters negotiate in good faith for retransmission consent with satellite carriers.

As the Notice of Proposed Rulemaking ("NPRM"), FCC 99-406, released December 22, 1999, in the above-captioned proceeding indicates, SHVIA amends Section 325(b) of the Communications Act by requiring the Commission to adopt regulations that "prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith."² In elucidating the good faith negotiation requirement, SHVIA further provides that "it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price

¹ Pub. L. No. 106-113, §§§ 1000(a)(9), 113 Stat. 1501 (1999).

² NPRM at ¶14.

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terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations."³ Citing these provisions of SHVIA, the NPRM requested comment on this good faith negotiation requirement and on what constitutes a competitive marketplace consideration.⁴

LIN agrees with the comments filed by other broadcasters, which express the view that, consistent with Congressional intent and market circumstances, the Commission should not adopt detailed, specific guidelines as to what constitutes good faith in the negotiation of retransmission consent agreements.⁵ The good faith requirement is a rule of reason, and the Commission should, at the most, adopt rules to facilitate the negotiation process, not to regulate the substance of the agreements that result from that process.

The substantive regulation of such retransmission consent agreements is unwarranted, because broadcasters lack leverage in the context of such negotiations. As other commenters have demonstrated, market conditions are such that local broadcast stations have a tremendous incentive to be carried by as many multichannel video programming distributors (MVPDs) as possible, and accordingly, to enter into retransmission consent agreements.⁶ Broadcast stations

³ *Id.*

⁴ *Id.* at ¶¶14–19.

⁵ See, e.g., Joint Comments of the ABC, CBS, FOX, and NBC Television Network Affiliate Associations, CS Docket No. 99-363, at 2-24 (Jan. 12, 2000) ("*Network Affiliate Comments*"); Comments of the Association of Local Television Stations, Inc., CS Docket No. 99-363, at 2-11 (Jan. 12, 2000) ("*ALTV Comments*"); Comments of CBS Corporation, CS Docket No. 99-363, at 5-14 (Jan. 12, 2000) ("*CBS Comments*"); Comments of Fox Television Stations, Inc., CS Docket No. 99-363 (Jan. 12, 2000) ("*Fox Comments*"); Comments of the National Association of Broadcasters, CS Docket No. 99-363, at 6-29 (Jan. 12, 2000) ("*NAB Comments*"); Comments of National Broadcasting Company, Inc., CS Docket No. 99-363 (Jan. 12, 2000) ("*NBC Comments*"); Comments of The Walt Disney Company, CS Docket No. 99-363, at 1-11 (Jan. 12, 2000) ("*Walt Disney Co. Comments*").

⁶ See, e.g., *ALTV Comments*, at 6-7; *CBS Comments*, at 9-10; *NAB Comments*, at 12-15; *NBC Comments*, at 2-6; *Network Affiliate Comments*, at 8-11; *Walt Disney Co. Comments*, at 9-11.

gain the majority of their revenues through advertising sales, which are driven, in large part, by the size of the station's audience.⁷ Broadcasters thus have every incentive to enter into retransmission consent agreements to increase audience size, and thereby, to increase revenues.

Elaborating on the comments filed by other broadcasters, LIN particularly emphasizes that a company owning two broadcast stations – either in the same market or in different markets – would not deviate from the good faith requirement by negotiating a joint retransmission consent agreement for more than one station.⁸ The fact that a company may own two or more broadcast stations and may wish to negotiate jointly on behalf of its stations, for administrative efficiency or other reasons, simply reflects a competitive marketplace consideration.

⁷ See, e.g., *NBC Comments*, at 3 ("Broadcasters have every incentive to enter into retransmission agreements with these satellite providers, as well as other MVPDs serving their market. Television broadcasters are in the business of getting the maximum number of viewers as possible for our programs. . . . In addition, because of the intense competition between and among television stations in any given market, a television broadcaster wants to be carried on at least as many MVPD systems as its competitors. The existence of one retransmission agreement between a station and an MVPD becomes a driver of other retransmission deals."); *Network Affiliate Comments*, at 8 ("Local television stations depend on viewership for advertising sales. More viewers yield more advertising revenue. More advertising revenue yields more net profits. . . . Program distribution and the degree to which MVPDs bring additional viewers to local stations serve to drive the parties toward – not away from – retransmission consent agreement."); *Walt Disney Co. Comments*, at 11 (explaining that the success of broadcasters is "dependent on their ability to reach the broadest viewing audience possible").

⁸ See, e.g., *ALTV Comments*, at 13-14 ("No reason exists to require separate retransmission consent negotiations or agreements when two stations in the same market share a common owner. . . . [T]he Commission determined in permitting such duopolies to exist that they would not possess sufficient market power to exert anticompetitive pressure in the local market. Indeed the new rules are designed to assure that newly formed duopolies do not pose a danger that the merged stations will garner excessive or anticompetitive levels of market power.") (internal citations omitted); *CBS Comments*, at 14-15 ("Certainly there should be no presumption, or even intimation, that television stations owning two stations in a market in full compliance with the Commission's rules could not negotiate retransmission arrangements with MVPDs for both stations jointly."); *NAB Comments*, at 27-28; *Network Affiliate Comments*, at 23 ("Any effort by the Commission to force a broadcaster to negotiate a separate retransmission consent agreement for each station with a MVPD is, perforce, at odds with the Commission's ownership rules and the statutory right to negotiate based on 'competitive marketplace considerations.'").

Commenters suggesting that the negotiation of a joint retransmission consent agreement would deviate from the good faith requirement have failed to offer compelling support for this position. First, commenters have asserted that the negotiation of a joint retransmission consent agreement is a "back door" way of accelerating Congressional must-carry requirements on satellite carriers.⁹ This assertion is simply incorrect. Voluntary carriage of broadcast signals pursuant to a negotiation is not tantamount to a regulatory obligation – but simply a response to a private offer that a satellite carrier is free to accept, reject, or counter. Second, commenters have stated that the negotiation of a joint retransmission consent agreement could enhance the risk of illegal tying arrangements.¹⁰ If the Commission is concerned that a broadcaster might withhold consent from an MVPD for carriage of one station unless it obtained carriage of all stations, the MVPD would have recourse to the antitrust laws, which are more than sufficient (and better suited) to address claims of illegal tying arrangements on a case-by-case basis.¹¹ The intensively fact specific determination of what constitutes anti-competitive negotiations should be handled by the courts and not *ex ante* by an administrative agency.

Finally, we concur with the comments that distinguish the Commission's task in implementing the good faith requirement of SHVIA from what it has done in regulating the

⁹ See, e.g., Comments of EchoStar Satellite Corporation, CS Docket No. 99-363, at 12-13 & n.31 (Jan. 12, 2000) ("*EchoStar Comments*"); Comments of DIRECTV, Inc., CS Docket No. 99-363, at 7-8 (Jan. 12, 2000) ("*DIRECTV Comments*").

¹⁰ See, e.g., *DIRECTV Comments*, at 7-8; *EchoStar Comments*, at 12-13 & n.31.

¹¹ See, e.g., *United States v. Loew's Inc.*, 371 U.S. 38, 44-45 (1962) (explaining, in the television licensing context, that tying arrangements "are an object of antitrust concern"); *MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265, 1279-81 (11th Cir. 1999) (holding that licensee of syndicated television programs could demonstrate antitrust injury as a result of tying arrangement), *reh'g and reh'g en banc denied*, 182 F.3d 938; see also, *NAB Comments*, at 28 (stating that as to the negotiation of joint retransmission consent agreements, "there is no reason to suggest that further action by the Commission is necessary: these transactions are subject to the same antitrust and other legal principles applicable to any commercial transaction or joint venture entered into by broadcasters").

obligations of common carriers to open their monopolies to competition.¹² The distinction is appropriate because the incentive structure in such a monopolistic context is inapposite to the incentive structure here. While an incumbent local exchange carrier has little incentive to limit its monopolistic profits – and thereby has little incentive to negotiate an interconnection agreement with a competitor – both broadcasters and MVPDs have a shared financial incentive to enter into retransmission consent agreements.

For the foregoing reasons, LIN urges the Commission to refrain from adopting detailed, specific guidelines, which may run counter to the intent of Congress, as to what constitutes good faith in the negotiation of retransmission consent agreements.

Respectfully submitted,

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¹² See, e.g., *CBS Comments*, at 8-10; *NAB Comments*, at 12; *Network Affiliate Comments*, at 8.